

(1875) 01 PRI CK 0002

In the Privy Council

Aumirtolall Bose and Others

APPELLANT

Vs

Rajoneekant Mitter and another

RESPONDENT

Date of Decision : 30-01-1875

Acts Referred:

Citation : (1875) 2 IndApp 113

Hon'ble Judges : James W. Colville, Barnes Peacock, Robert P. Collier, JJ.

Judgement

Barnes Peacock, J. 1. The Respondents were Plaintiffs and the Appellants Defendants in the Court below. The Plaintiff, Rajoneekant Mitter, as the only son of a daughter of Bam Nursing Bose, deceased, sued to recover a 4-annas share of certain ancestral estates, and of certain other properties purchased with the income of the said estates. The Plaintiff, Womeschunder Boy, claimed as a purchaser of a portion of the said share from the Plaintiff, Rajoneekant. His title depends upon that of Rajoneekant. 2. The ancestral estates originally descended to Bam Nursing and his three brothers from their father, Gokool Ghunder Bose, and were held by them as an undivided Hindu family. Ram Nursing Bose died in November, 1824, without a son, leaving a widow, Soorjomoneye, and three daughters, Bindubasseenee, Sarodamoye, and: Nittokally. Soorjomoneye, the widow, died in March, 1835, and upon her death the heirs of Bam Nursing were Sarodamoye and Nittokally, two of the daughters, who were then married and likely to have sons. It may be taken against the Plaintiff, upon his own statement, that Bindubasseenee could not take any interest in her father's estate, as she was a childless widow at the time of her mother's death. In his plaint he says:

My elder aunt, Bindubasseenee, having become a childless widow, my grandmother supported her and the other two daughters, who were both under age, and effected the marriages of the two unmarried daughters in due and proper time. On the 30th Bysack, 1242, my maternal grandmother breathed her last, leaving behind her my mother and my two maternal younger aunts "(meaning his mother and his maternal younger aunt, Nittokally), "who were

under age, and my maternal aunt, Bindubasseenee, under the maintenance and control of my maternal great-uncles." 3. He then states his own title and eviction as follows: My mother attained her majority in the month of Choitro, 1243, and as my youngest maternal aunt unfortunately became a childless widow in the year 1244, so the right of succession to all the aforesaid properties accrued to my mother, according to Shasters. I was born in the year 1246 : but, owing to my evil fortune, I was at my tender age bereaved of my mother, who breathed her last on the 25th Kartick, 1252. Since then I, together with my maternal aunts, remained under the guidance of Joy Doorga Dassy, mother of Prem Chand Bose and Aumirtolall Bose, heirs of my maternal grand-uncle; and on their attaining majority, in the same house and in the same mess, and under the superintendence of the said persons, on the 16th Srabun, 1262, I attained my majority. When I came to know what property I was entitled to as my grandfather's heir, I proposed separately to realize the collections of the one-fourth share of all the real and personal properties left by my maternal grandfather and grandmother, and mother, and of the real and personal properties, i.e., talooks, &c, acquired in my own name or benamee from the joint funds. Prem Chand Bose, Aumirtolall Bose, and Joy Doorga Dassy, the principal Defendants, having been instigated by the ill advice of wicked persons, and supported by the Defendant Gooroodoss Boy, with the motive of divesting me of my rights,, forcibly expelled me from the joint dwelling-house on the 16th Kartick, 1264, and having ousted me by artifice, forcibly and fraudulently held possession of all the properties, and are enjoying the profits arising from the estate. 4. The principal Defendants, in answer to the Plaintiffs claim, stated that Bam Nursing Bose, having no male issue, and having no probability of male issue, executed, in the year 1231, a hibbanamah, or deed of gift, to his three brothers, and breathed his last. They then proceed: The aforesaid three donees, by virtue of the said deed of gift, applied to the Courts to be made representatives in the cases that were then pending in the Court in the name of the said Bam Nursing Bose. An istaharnamah (proclamation) was duly issued from the Adawlut for the appearance of an heir within the period of six weeks. As the maternal grandmother of the Mitter Plaintiff was acquainted with the truth and validity of the said deed of gift, no objections on that head were urged by her. The hibbanamah was produced in the Court by our predecessors, and testified to by them; and the Judge, considering the said deed to be genuine and proved, ordered, on the 22nd of November, 1825, the said Ramtunoo and Ramdoyal to be made representatives in the place of the aforesaid Bam Nursing Bose. The said representatives, agreeably to which, conducted the suits" in the Zillah and Suddur Courts, and having retained possession of all the properties specified in the hibbanamah, from the date of the said hibbanamah, managed the affairs, conducted several suits before the tribunal of different Courts, and even in appeal to the Privy Council. 5. Three issues were laid down for trial, viz.: 1. Whether the Plaintiff, Rajoneekant, as heir to a part of the paternal and self-acquired properties of Ram Nursing Bose, his grandfather (the lather of his mother), was in possession or not; and whether, on the 16th Kartick, 1264, B.S.,

the Defendants dispossessed him by turning him out of doors; and Rajoneekant ought to recover possession with mesne profits or not? 2. Whether, according to the bill of sale given by Rajoneekant, both the Plaintiffs can be entitled to possession of the property in dispute in equal proportions or not? 3. Whether, according to the deed of gift of Rajonee's maternal grandfather, Defendants have been holding possession; and whether such long and continuous possession bars the suit, and it should be dismissed or not? 6. The plaint was filed on the 9th of September, 1858, before the Code of Civil Procedure (Act VIII. of 1859) and before the passing of the present Limitation Act XIV. of 1859. The question of limitation must be determined according to the old law. 7. The Defendant's case is that limitation began to run from the time of Ram Nursing's death. The Judge of Jessore held that there was no proof of possession by the Plaintiff or by his mother or maternal grandmother. 8. It has been held by a full Bench of the High Court of Calcutta, that in the case of a succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate but from the time at which it would have been reckoned against the widow if she had lived and brought the suit: see *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* 9 Suth. W.R. 505. That rule has been acted upon in other cases, and it appears to their Lordships that the principle of that decision is correct. If in the present case limitation began to run against Soorjomoneye, the widow of Ram Nursing, the Plaintiff's suit is barred. 9. The Judge of Jessore found that there was no proof of possession by Soorjomoneye or by the Plaintiff or his mother : and he held that limitation was a bar. Many of the Plaintiff's witnesses, however, deposed that Soorjomoneye was in possession. The Judge of Jessore says: What he (referring to the Plaintiff) relies on, is the evidence of thirty-nine witnesses, who speak to his possession and ejectment. The evidence of these persons is to the effect that after the death of Bam Nursing, his widow and daughters, and latterly his daughter's son, were in joint possession with the Defendants; that about two years ago the Plaintiff, finding that when in joint possession he was burdened with an unfair share of the expenses, asked for a division of the shares, whereupon the Defendants told him that he had no right to anything, abused him, and turned him out of the house. Most of the witnesses are well acquainted with the Bose family and their history. They live near or on the same spot. Some are to all appearance very respectable; nearly all give a connected, and some a full account, of the Plaintiff's conditional prospects and treatment. 10. The evidence of the witnesses above referred to is very loose and unsatisfactory; still their Lordships are induced by it to believe that Bam Nursing's widow, Soorjomoneye, continued to live with her deceased husband's brothers and was supported by them out of the income of the estate. Nothing could be more natural or consistent with the usage of Hindu families than that upon her husband's death she should continue to reside at the family dwelling-house as a member of the joint family. Indeed, the principal Defendants state in their answer that "they retained their brother's wife, the said Soorjomoneye,

and unmarried daughter, under their own support and guidance, and they effected the marriage of the unmarried daughter into a suitable family, and in a proper manner." If the widow and her daughter continued to live as members of the joint family, the presumption would be that they were maintained out of the widow's share, which she inherited from her husband, unless it could be distinctly shewn, which it has not been, that she received only maintenance as distinguished from a participation in the profits of the estate; for, even if she did not receive her full share of the profits, limitation would not run against her in the same manner as if she had been actually dispossessed of her husband's share of the estate. 11. As regards her daughters Sarodamoye and Nittokally the case would be different. They were married during their mother's lifetime, and would naturally go to the residences of their respective husbands and become members of their respective families. 12. The evidence is not such as to induce their Lordships to believe that either Sarodamoye or Nittokally, upon their mother's death, entered into joint possession of the estate with their father's brothers or their representatives, or that during the lives of their husbands they participated in the profits of the estate. Nittokally, after her husband's decease, may possibly have gone to live with her father's brothers, though, it is to be remarked, that in the description of her place of residence as a Defendant in the suit she is stated to be of "Kattara pergunnah Nuldee," which is different from that given of Bindubasseenee. It is unnecessary, however, to come to any conclusion in that respect as regards her. Sarodamoye died before her husband, and there is no sufficient evidence to induce their Lordships to believe that after her marriage she continued with her father's brothers as a member of an undivided Hindu family. 13. Their Lordships find that limitation began to run against the Plaintiff's mother, Sarodamoye, and that neither she nor the Plaintiff ever had possession of any portion of his maternal grandfather's estate or of the rents or income thereof. But the period of limitation must be calculated according to the old law, and consequently the periods during which the Plaintiff and his mother were respectively under the disability of minority must be deducted. Deducting those periods, there were only eight years seven months and twenty-four days during which the Plaintiffs mother, and three years two months and nine days during which he himself, was not under disability, even calculating the period of the Plaintiffs majority at the age of sixteen, and not eighteen. This would give only eleven years nine months and thirty-three days as the period to be taken against the Plaintiff in calculating the time which had run against him at the time when his suit was commenced. 14. The High Court reversed the finding of the Zillah Judge upon the question of limitation, and stated that it had not been insisted upon before them. Their Lordships see no reason for interfering with that decision. 15. The question remains whether the Plaintiff has made out his title for he must recover (if at all) upon the strength of his own title, and not upon the weakness of that of his adversaries. 16. The title upon which he relied in his plaint was, that in consequence of his youngest maternal aunt's (i.e. Nittokally's) becoming a childless widow after the death of his grandmother and in the lifetime of his mother (Sarodamoye), all the property accrued to his

mother according to the Shasters. But that was not so. The right to inherit vested in Nittokally jointly with Sarodamoye, her sister, upon the death of their mother; for at that time she and her sister Sarodamoye were two young married women, likely to have sons; and it is clear that, according to the Hindu law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested. 17. This at once disposes of the claim of the Plaintiff to take as heir to his grandfather any portion of the estate which vested in Nittokally, for she was living when the suit was commenced. It was contended, however, that the Plaintiff, as the heir to his grandfather, succeeded upon the death of his mother to one moiety of the 4-annas" share which descended to his mother and Nittokally, as Nittokally at the time of his mother's death was a childless widow. No proof was given that Nittokally became a childless widow during the lifetime of Sarodamoye, but it was contended on behalf of the Plaintiff that the fact was alleged in the plaint and admitted by the answer. The statement in the plaint is—That as my youngest maternal aunt unfortunately became a childless widow in the year 1244 (that is, April, 1837) so the right of succession to all the properties accrued to my mother, according to the Shasters. 18. The answer is as follows: From the statement in the plaint, that subsequent to the death of the maternal grandmother of the Mitter Plaintiff, her three daughters lived some in a married state, some in a state of celibacy, and that all the properties left by his maternal grandfather devolved upon his mother, it is evident that this suit has been instituted merely from a malicious and vindictive motive. For agreeably to the Dhurm Shasters, and Dayabhaga, though any woman after obtaining paternal properties becomes a widow or sterile, yet nothing can bar her right to enjoy the said property during her lifetime; therefore the statement that subsequent to his maternal aunts becoming widows the right and interest to all the properties devolved upon his mother is utterly false and fallacious. 19. It appears to their Lordships that there is no admission in the answer tantamount to proof of the fact that Nittokally's became a childless widow during the lifetime of the Plaintiffs mother, Sarodamoye. There is a denial that Sarodamoye took the whole of her father's estate in consequence of Nittokally's becoming a childless widow; but no admission that at the time of Sarodamoye's death Nittokally was a childless widow, incapable of taking by descent from her father. There is merely an admission by implication in the denial of the legal effect imputed to the fact alleged; and it has been repeatedly held that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact : *Edmunds v. Groves* 2 M. & W. 642; *Smith v. Martin* 9 M. & W. 304; *Robins v. Maidstone* 7 Q.B. 815; and it scarcely needs to be remarked that the effect given in our Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India. 20. Their Lordships, however, would hesitate before determining the case upon the ground that there was no proof that Nittokally became a childless

widow in the lifetime of her sister Sarodamoye; for it was assumed throughout the argument before their Lordships that such was the case. They will, therefore, proceed to determine the question upon the assumption that Nittokally was a childless widow at the time of Sarodamoye's death. 21. The question then resolves itself into this : had Sarodamoye an interest in the estate distinct from that of Nittokally, which upon her death descended to the then heirs of her father; or did she and her sister Nittokally take a joint estate by descent which after Sarodamoye's death survived to her sister Nittokally? If the former was the case, then Nittokally having during the lifetime of Sarodamoye become disqualified as a childless widow to take by descent from her father, the Plaintiff, as the son of Sarodamoye, was the next heir to her father, and upon his mother's death would have taken as reversionary heir to his grandfather the interest which had descended to his mother, and which upon her death would have descended to Nittokally as reversionary heir to her father if she had not at that time been disqualified; but if Sarodamoye and her sister Nittokally, upon the death of their mother, together constituted their father's heir, then upon the death of Sarodamoye the property which descended to the two sisters jointly survived to Nittokally, and her disqualification to inherit at that time did not destroy the right of survivorship which she had previously acquired by inheritance. 22. There is a great analogy between the case of widows and that of daughters taking by inheritance, though the pretension of daughters is inferior to that of widows *Daya-Bhaga* cap. 11, Section 2, par. 30, p. 193, *quarte* edition. 23. In the case of widows it has been held by the Judicial Committee (see *Bhugwandeem Doobey v. Myna Baee Moore's Ind. Ap. Ca. 487* that the estate of two widows, who take their husband's property by inheritance, is one estate. "The right of survivorship," it is there said, "is so strong, that the survivor takes the whole property, to the exclusion, even, of daughters of the deceased widow." 24. In the case of *Strimuttu Muttu Vezia Bagunada Rani v. Dorasingay Tevar* 6 Madras H.C. Reps. 310, it was held that daughters, to whom as a class paternal property descends, take a joint interest, with rights of survivorship. 25. The former case had reference to property in Benares, and the latter to property in Southern India. 26. In the case of *Boidyanath Sett v. Durga Churn Basak*, High Court of Bengal, original jurisdiction, decided on the 28th of February, 1865, it was held by Mr. Justice Morgan, after consulting Mr. Justice Shumbhoonath Pundit, a learned Hindu lawyer, that in a case where two daughters succeeded, by inheritance, to their father's estate, and one of them died, leaving her sister, who had then become a childless widow, the property survived to her sister; because, like widows, the two daughters collectively were, in a legal sense, one heir to their father (*Vyavastha Darpana*, by Shamachurn, Sircar, octavo ed. p. 170). Their Lordships are of opinion that the last-mentioned decision was correct, and that upon principle, as well as upon authority, the estates, upon the death of Surodamoye, survived to Nittokally, though she would, at that time, have been incompetent to take by inheritance from her father. 26. The High Court express no opinion upon that point; they seemed, however, to assume that the Plaintiff acquired no right by inheritance during the lives of his aunts; but they decided in

favour of the Plaintiff, upon the strength, of a petition said to have been presented to the Court by Bindubasseenee and Nittokally, who were made Defendants in the suit. 27. In the Index to the Record the petition is described as "the petition of Bindubasseenee, filed on the 16th of April, 1859," which was more than six months after the filing of the plaint. The petition forms no part of the record transmitted to Her Majesty in Council; for in a note to the Index it is stated that the paper cannot be traced. An abstract of the petition is set out in the decree or" the Zillah Judge. It is as follows: Abstract of the Petition of Bindubasseenee Dassee and Others. On the 10th of April of the current year, that is, 1859, the said Dassee and Nittohally Dassee, two Defendants, filed a petition, stating that they have no objection against the suit of the Plaintiff: that their father, Ram Nursing Bose"s, rights continued in the Plaintiff Rajoneekant, as the real heir; that their father-did not execute any hibbanmah; and that they agreed in the said suit of the Plaintiffs, &c. 28. The Zillah Judge, speaking of this petition, says: "I set no value on a petition said to have been filed by these women "(referring to Bindubasseenee and Nittohally), "consenting to the Plaintiff"s suit. We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to any thing." 29. With reference to this part of the case, the High Court says: But another objection is taken to the suit, namely, that as plaintiff"s maternal aunts, Bindubasseenee and Nittokally, childless widows, are still living, and the Plaintiff"s right to succeed is contingent on his surviving them, his suit is at any rate premature, These two ladies have filed in the record of this case a petition, in which they acknowledge the Plaintiff to be the rightful heir, disclaim any right of their own, and assent entirely to the suit. The Judge, gratuitously as it seems to us, declares that he sets no value on this petition. He says, "We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything. We can find no reason for these observations. The petition appears to have been filed in the usual way, through a pleader duly authorized; it is not suggested that the women had anywhere repudiated it, and we think it must be allowed the fullest legal effect of which it is capable. But, we are asked, what is its effect? Females are not at liberty to do or assent to acts which may have the effect of changing the course of succession, and these two ladies, the Respondents contend, cannot combine to give the inheritance in this case to a person who might eventually not be the legal heir. We consider this objection untenable a Hindu widow, it has been ruled, is competent to alienate, with the consent of the next heirs, an estate of which she is in possession under a life interest; she has also been permitted to convey the estate to the next heir himself. It is admitted that, by retiring from the world, or becoming byragees, they might immediately cause the succession to devolve on the Plaintiff; and we think that when the Plaintiff raises a particular question of title with the Defendants, which clearly his aunts would be first entitled to raise, and he next after them, and where they expressly give up their right in his favour, and assent to his suit, the Defendants cannot be permitted to object that Plaintiff is debarred from suing until they are, by the course of nature, out of the way. We see,

therefore, no difficulty in the way of a decision of this suit as at present constituted. 30. It appears to their Lordships that the Judges of the High Court have given a greater effect to this petition than that to which it is entitled. 31. Admitting, for the sake of argument, that the petition having been filed in the suit might, without proof of the execution of a vakalatnamah by these ladies, or of any authority to file it, be used against the Defendants, Bindubasseenee and Nittokally, as an admission by them in the suit that the Plaintiff was the real heir, and that they had no defence to the suit, it appears to their Lordships that that is the greatest effect that could be given to the document. The petition did not amount to a conveyance or to a disclaimer of title, but merely to an admission made more than six months after the commencement of the suit, that the Plaintiff was the real heir, and that they had no defence to offer it is clear that an admission, or even a confession of judgment, by one of several Defendants in a suit, is no evidence against another Defendant. Suppose Nittokally, the real heir, had been barred by limitation, she could not by her admission, contrary to the fact, that the Plaintiff was the real heir, have bound the other Defendants, and thus have entitled the Plaintiff, upon a question of limitation, to a deduction of the period of his minority, to which she would not have been entitled herself. 32. But there was, in fact, no evidence of any authority to file the petition. If a vakeel professing to act for Nittokally had filed a deed purporting to have been executed by her before the commencement of the suit conveying the estate to the Plaintiff, it would not have been evidence against the other Defendants without further proof. 33. The decision of their Lordships upon the first issue having disposed of the present suit, it is perhaps unnecessary for them to express an opinion upon the third issue. They think it right, however, to add that they agree with the High Court in the conclusion at which they have arrived, viz., that in the present suit the Defendants have wholly failed to establish the hibbaon which they rely as the foundation of their title. 34. Their Lordships are of opinion that the Plaintiff had no right to inherit any portion of the estate during the life of Nittokally, and that the petition did not vest any such right in him. His suit ought therefore to be dismissed, and dismissed against all the Defendants, including Bindubasseenee and Nittokally, notwithstanding the petition. Such a petition confessing the suit cannot be admitted as warranting a judgment against them, when upon an investigation it appears that the Plaintiff was not the real heir; nor could it justify a decree against them for possession and mesne profits, when there was no allegation in the plaint, nor any evidence in the cause, that they had dispossessed him. The only charge of dispossession was against the principal Defendants, Prem dliwnd Boss, Aumiriolall, and Joy Doorga Dassee. Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be reversed, except so far as it reverses the judgment of the Zillah Judge, and that the suit be dismissed. 35. Considering that a great part of the costs has been incurred in consequence of the issues upon which the Defendants have failed, and that it was necessary for the Plaintiff to get rid of the decision of the Zillah Judge, their Lordships think it right to order that the parties respectively do bear their own costs in both the lower Courts and

of this appeal. 36. The Judges of the High Court expressly declared by their decree that it was "to be known that from the death of Nittohalhj any dispute concerning the inheritance by other parties was not determined by their decision." Their Lordships think it right to add, that they do not decide any question between Nittokally or Bindubasseenee and the other Defendants, but merely the questions raised in the suit as to the rights of the Plaintiff at the time when the suit was instituted.